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No. 80-251

IN THE

Supreme Court of the United States

October Term, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM JUDGMENT

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	iii
I. MOTION TO AFFIRM AND STATEMENT OF THE ISSUES RAISED THEREBY	1
A. Motion to Affirm	1
B. Statement of the Issue on Appeal	1
II. STATEMENT OF THE CASE AND ANALYSIS OF THE RECORD	4
A. The MSSA	4
B. The MSSA, Women, and Congress in 1948	4
C. Enacted Amendments to the MSSA	6
D. Facts Relevant to the Grounds for This Appeal	6
1. Factual Contentions Urged by Appellant	6
2. The Facts Found by the District Court	8
E. The 1980 Presidential Proposal to Register Women	15
III. SUMMARY OF ARGUMENT	19
IV. ARGUMENT	23
A. Male-Only Registration Must Pass the Heightened Scrutiny Applied to Gender Discrimination Cases	23
1. Gender-Based Classifications Are Appropriately Judged Under a Standard of Heightened Scrutiny	24
2. Schlesinger v. Ballard Neither Applies Nor Supports the Application of the Rational Relationship Test to Gender Distinctions in This Context	26
3. Frontiero Requires a Test of Heightened Scrutiny in This Case	31
4. The First Amendment Military Precedents Are Inapplicable	32
5. There Is No Reason in Policy or in the Constitution to Dilute the Standard of Review	34

TABLE OF CONTENTS (Continued)

Page

B. The Judgment Below Should Be Affirmed Because the Deliberations of Congress in 1948 Disclose No Justification for Male-Only Registration in the MSSA .. 36

C. The Judgment Should Be Affirmed Because Even the Subcommittee Conclusions Are Insufficient Under Any Standard to Justifying the Male-Only Registration Enacted in 1948 37

D. The Record Amply Supports the Factual Findings and Conclusions of the District Court That Male-Only Registration Is Not Positively Correlated to the National Defense 39

1. The Senior Military Officers and Military Studies 40

2. Civilian Defense Officials 44

V. CONCLUSION 46

TABLE OF CITATIONS

Cases: Page

Bankers Trust Company v. Mallis, 435 U. S. 381 (1978) 3
Brown v. Glines, 100 S. Ct. 594 (1980) 20, 29, 30, 32
Buckley v. Valeo, 424 U. S. 1 (1976) 46, 47
Califano v. Goldfarb, 430 U. S. 199 (1977) 25, 38
Califano v. Webster, 430 U. S. 313 (1977) 25, 28
Califano v. Westcott, 443 U. S. 76 (1979) 25, 35
Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974) 37
Craig v. Boren, 429 U. S. 190 (1976) 2, 19, 23, 24, 25, 28, 34, 35
Ex parte Milligan, 71 U. S. 2 (1866) 34
Frontiero v. Richardson, 411 U. S. 677 (1973) 20, 23, 24, 31, 35
Gillette v. United States, 401 U. S. 437 (1971) 31
Greer v. Spock, 424 U. S. 828 (1976) 30, 32
Griffin v. Illinois, 351 U. S. 12 (1956) 30
Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U. S. 146 (1919) 34
Hampton v. Mow Sun Wong, 426 U. S. 88 (1976) 19, 38
Loving v. Virginia, 388 U. S. 1 (1967) 30
Marbury v. Madison, 5 U. S. (1 Cranch) 137 (1803) 35
Mathews v. Lucas, 427 U. S. 495 (1976) 38
Memorial Hospital v. Maricopa County, 415 U. S. 250 (1974) 47
Meyer v. Nebraska, 262 U. S. 390 (1923) 30
O'Callahan v. Parker, 395 U. S. 258 (1969) 30
Orr v. Orr, 440 U. S. 268 (1979) 19, 25, 28
Owens v. Brown, 455 F. Supp. 291 (D. D. C. 1978) 14
Parker v. Levy, 417 U. S. 733 (1974) 30
Personnel Administrator of Massachusetts v. Feeney, 442 U. S. 256 (1979) 25, 26
Procunier v. Martinez, 416 U. S. 396 (1974) 33
Raderman v. Kaine, 411 F. 2d 1102 (2d Cir. 1969) 29
Reed v. Allen, 286 U. S. 191 (1932) 3
Reed v. Reed, 404 U. S. 71 (1971) 24, 28, 29, 35
Sec'y of Navy v. Huff, 100 S. Ct. 606 (1980) 30
Schlesinger v. Ballard, 419 U. S. 498 (1975) 8, 19, 20, 23, 26, 27, 28, 29, 31, 32

TABLE OF CITATIONS (Continued)

Cases (Continued): Page

Shapiro v. Thompson, 394 U. S. 618 (1969) 29, 30
Skinner v. Oklahoma, 316 U. S. 535 (1942) 30
Snepp v. United States, 100 S. Ct. 763 (1980) 33
Stanton v. Stanton, 421 U. S. 717 (1975) 24, 25
United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 34
United States v. General Dynamics Corp., 415 U. S. 486 (1974) 39
United States v. Indrelunas, 411 U. S. 216 (1973) 3
United States v. Macintosh, 238 U. S. 605 (1930) 32
United States v. Offord, 373 F. Supp. 1117 (E. D. Wis. 1974) 29
United States v. Robel, 398 U. S. 258 (1967) 34
United States v. United States Gypsum Co., 333 U. S. 364 (1948) 39
Weinberger v. Wiesenfeld, 420 U. S. 636 (1975) 36, 37, 38
Wengler v. Druggists Mutual, 64 L. Ed. 2d 107 (1980) 25
Zablocki v. Redhail, 434 U. S. 374 (1978) 30

Statutes and Rules:

5 U. S. C. § 627 5
10 U. S. C.:
§ 3071 14
§ 6015 14
§ 8067 14
§ 8549 14
14 U. S. C. § 182(a) 14
50 U. S. C.:
§ 451 et seq. 1
§ 453 ..... 3, 33
§ 462 33
Nurses Selective Service Act of 1945 12
Rules of Supreme Court, Rule 16.1(d) 1
Fed. Rule Civ. Proc. 52(a) 39, 40

United States Constitution:

Article I, Section 8 ..... 27, 31
First Amendment, Generally 32, 33, 34
Fifth Amendment, Due Process Clause 1, 19

TABLE OF CITATIONS (Continued)

Miscellaneous: Page

America's Volunteers, A Report on the All-Volunteer Armed Forces, Dec. 31, 1978 ..... 17, 42, 43

Beans, Sex-Discrimination in the Military, 67 Military L. Rev. 19 (1975) 11

Goodman, "Women, War and Equality", 5 Women's Rights Law Reporter 243 (1979) 26

Hearings before the Committee on Armed Services Subcommittee on Military Personnel, House of Representatives, March 5, 1980 16

Hearings on S1614 Before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services, 80th Cong., 2d Sess. No. 238 (1948) 11

Improving Capability to Mobilize Military Manpower: A Report by the Director of Selective Service—Draft Working Document, 16 Jan. 1980 19

Johnson & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N. Y. U. L. Rev. 675 (1971) .. 25

Presidential Recommendation For Selective Service Reform: A Report To Congress Pursuant to P. L. 96-107 (Feb. 11, 1980) 15, 16

Report by the Special Subcommittee on the Utilization of Manpower in the Military of the House, Committee of Armed Services, 92nd Congress, 2d Sess. 14658 (1972) 9

Ruhn, Constitutional Law—Equal Protection—Sex Discrimination—Selective Services Laws, [1976] Wis. L. Rev. 330 (1976) 26

U. S. Army Human Engineering Laboratory, Ammunition Loading and Firing Test—Pretest Physical Conditioning of Female Soldier Participants 46

H. R. Res. 521 18

H. Rep. 194, 79th Cong., 1st Sess. (1945) 12

S. Rep. 130, 79th Cong., 1st Sess. (1945) 12

S. Rep. 117, 82nd Cong., 1st Sess. (1951) 12

I. MOTION TO AFFIRM AND STATEMENT OF THE ISSUES RAISED THEREBY

A. Motion to Affirm

Appellees, plaintiffs below, respectfully move pursuant to Rule 16.1(d) of the Rules of this Court for affirmance of the judgment below which declared unconstitutional, and enjoined enforcement of the registration provisions of, the Military Selective Service Act ("the MSSA"), 50 U. S. C. App. §§ 451 *et seq.* This motion is filed at the request of the Court, as set forth in the letter of the Clerk dated October 7, 1980. Appellees respectfully suggest that, should this motion be granted, the mandate of this Court be stayed for thirty days to enable Congress to enact such new legislation as it deems appropriate in the area.

B. Statement of the Issue on Appeal

The District Court decided a narrowly defined and carefully stated issue:

> "The issue before us is whether exclusion of women is substantially related to an important governmental function. This issue does not involve the court in determining how the military should utilize women in any given situation. The issue before us is the constitutionality of the total exclusion of women from the MSSA, not the extent to which the military services must utilize women." (Jurisdictional Statement at page 20a ("Jur. St., 20a")).

Similarly at issue in this appeal is whether registration for possible military conscription may be gender-biased and still satisfy the Due Process Clause of the Fifth Amendment, and thus whether the present male-only registration provisions of the MSSA are unconstitutional. Scrutinizing those provisions under the test established by this Court for review of gender-based classifications, a

statutory three-judge panel sitting as the United States District Court for the Eastern District of Pennsylvania ruled in a unanimous Memorandum Opinion [1] and Order [2] of July 18, 1980, that the MSSA violated the Due Process Clause of the Constitution and enjoined defendants "from requiring the registration under the [MSSA] of any member of the plaintiff class." (Jur. St., 44a). Based upon a close and careful analysis of a record at trial which consisted of more than 2,000 pages of documents and testimony, compiled over the course of nine years of investigation and discovery, the District Court held that:

> the complete exclusion of women *from the pool of registrants* does not serve "important governmental objectives" and is not "substantially related" . . . to any alleged governmental interest. Thus, the MSSA unconstitutionally discriminates between males and females. (emph. supplied). (Jur. St., 43a).

Appellees urge this Court to affirm summarily the judgment of the District Court because, when viewed in the context of the full record which was before the trial court and is now in this Court, the grounds advanced for reversal in the Jurisdictional Statement are so manifestly without merit as to require no plenary review.[3] The legal standard applied by the District Court was

1. Jur. St., Appendix A.

2. Jur. St., Appendix B.

3. The question presented by the appeal is whether "the exclusion of females from the registration provisions of the [MSSA] invidiously discriminates against males in violation of the Due Process Clause." (Jur. St., I). The two grounds urged for reversal are that the District Court erred in (1) examining the gender discrimination in the registration requirement of the MSSA under the standard of *Craig v. Boren*, 429 U. S. 190 (1976); and (2) finding the MSSA unconstitutional when examined under *Craig*. (Jur. St., 7, 12). Additionally, the only appeal taken was from the order of

clearly mandated by prior decisions of this Court; and the factual findings of the District Court are both dispositive of Appellant's contentions and amply supported in the Record.

In its ruling, the Court below emphasized that the focus of this case is on the registration provisions of the MSSA.[4] The District Court assumed no broadening of the roles available to women in the military. (Jur. St., 21a-22a). Nor did it consider any fixed ration of male to female conscripts; it left that question to be determined by the needs of the military at the time of, and in the circumstances which require, renewal of conscription. *Id.*

> "To summarize, we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces. We need not decide if women must serve in all roles in the military including combat." (Jur. St., 21a-22a).

See also, Jur. St., 32a-36a.

Thus the only issue in this case is the validity of the *total exclusion* of *all females* from *registration* as potential draftees into any military position. Appellees urge this Court to affirm as manifestly correct (1) the applicability of heightened scrutiny to sex-discrimination in registration for the pool of potential draftees, and (2) the conclusion that the MSSA is unconstitutional under that standard.

---

3. (Cont'd.)

July 18, 1980. The Government took no appeal from the final judgment entered on July 30, 1980, which became unappealable no later than September 28, 1980. *Cf. Reed v. Allen,* 286 U. S. 191, 200-01 (1932). *Compare, United States v. Indrelunas,* 411 U. S. 216, 220-22 (1973); *Bankers Trust Company v. Mallis,* 435 U. S. 381 (1978).

4. 50 U. S. C. App. § 453.

II. STATEMENT OF THE CASE AND ANALYSIS OF THE RECORD

A. The MSSA

The MSSA was enacted in its modern form in 1948,[5] and has been updated periodically.. The basic structure of the MSSA, particularly the relationship of registration to all other and subsequent provisions, has remained intact since 1948. The import of the sections of the MSSA most pertinent to the issues raised in this appeal is as follows:[6]

The MSSA is intended to achieve an adequate armed strength by a system of selection which is fair and just, and in which the obligations and privileges of service are shared generally. (MSSA, Sec. 1(a)-(c)). The MSSA calls for the registration of males only. (MSSA, Sec. 3). Liability for conscription or induction into military training and service is limited to registrants, *i.e.*, to males. (MMSA, Sec. 4(a)). Before any conscript may be sent abroad, he must be given at least twelve weeks military training. (MSSA, Sec. 4(a)). Selection for induction is made from present registrants who are liable for training and service and are not exempt or deferred. (MSSA, Sec. 5(a)(1)). Failure to perform any duty imposed by the MSSA or regulations promulgated thereunder is a felony, punishable by imprisonment and fine. (MSSA, Secs. 12, 15(b)).

B. The MSSA, Women, and Congress in 1948

The uncontested fact is that when Congress enacted the MSSA in June 1948, it gave *no explicit consideration* whatever to whether male-only registration for conscription was necessary or even sound. The Government has admitted in this case that "the question of inclusion or exclusion of females in or from registration or conscription is not explicitly considered in any way in any of the statu-

5. 62 Stat. 604.

6. The MSSA appears in full text at pages 77 through 127 of the Revised Joint Documentary and Stipulated Record (R77-127).

tory history of the Military Selective Service Act, as amended, or of any predecessor conscription statute in the United States."[7] (R1714).

Contrasting with the lack of justification in the history of the MSSA, the District Court observed that at the time "an aura of male chauvinism permeated Congressional attitudes toward women in the military." (Jur. St., 23a, n. 15). Appearing before the House Subcommittee on Military Personnel on March 5, 1980, Deputy Assistant Attorney General Lawrence Sims characterized the Congressional attitude in 1948:

> "The reason for [not relying upon the legislative history or the reasoning of Congress to defend the all-male registration provisions of the MSSA] is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress." (R1044; Jur. St., 23a, n. 15).

Mr. Sims' reference to the stereotypes which controlled Congressional perception of women in the military in 1948 is equally supported by the debates over the Women's Armed Services Integration Act ("WASIA"), 5 U. S. C. § 627, which was considered by the same committees and by the same Congress at the same time as the MSSA.[8] The stereotypes cited to the District Court included assertions that men would not "take orders from" female officers and that women would "get married" long before they would qualify for military pensions. (Jur. St., 23a, n. 15).

7. Plaintiffs' Requests For Admissions (Set No. 2). (R1712-1714). Those Admissions followed Defendants' Response to Interrogatory No. 28 (R60-61), which requested a statement of all legislative facts found or relied upon by Congress in support of all-male registration. (R60-61).

8. The WASIA brought the Women's Army Corps and other female forces from Reserve to Active status.

See also, Congressional Record-House, June 2, 1948, p. 6967; April 21, 1948, p. 4694.

C. Enacted Amendments to the MSSA

A lack of Congressional findings relating to the registration of women has characterized all enacted revisions or amendments to the MSSA. (R1713-14; ¶¶ 2, 4, 6).

D. Facts Relevant to the Grounds for this Appeal

1. Factual Contentions Urged by Appellant

Appellant's principal source for "facts" relied upon to support male-only registration is S. Rep. 96-826, April 22, 1980, the report of the five-man majority of the Senate Subcommittee on Manpower and Personnel. (R874-886). Appellant contends that any eventual conscription would inevitably be for combat positions foreclosed to women; that there are enough female volunteers to fill non-combat positions open to women; and that merely having women registered and *available* for the draft would somehow reduce military flexibility and lead to unacceptable administrative problems (Jur. St., 12-15). S. Rep. 96-826 itself can be traced directly to the request by the Department of Justice for *post hoc* statutory history for use *in this case.* In March 1980, Deputy Assistant Attorney General Lawrence Sims appeared before both the House Subcommittee on Military Personnel and the Senate Subcommittee on Manpower and Personnel. In those appearances, he candidly described the constitutionally impermissible stereotyping reflected in the statutory history of the MSSA,[9] and explained to both subcommittees that the three-judge court in Philadelphia was going to rule on the constitutionality of male-only registration:

Mr. Sims. "Before doing so, I would like to note that that is a matter that is currently in litigation

9. Quoted at p. 5, above.

before a three judge Federal Court in Philadelphia, the specific issue of the constitutionality of an all male draft." (R1042).[10]

Mr. Sims was appearing in connection with the President's proposal to amend the MSSA to authorize the registration of women. In the alternative, Mr. Sims formally requested the creation of new "history," for imputation to the full Congress now and in 1948, to replace the lack of reasoned consideration which the Government has admitted characterized the exclusion of women from registration under the MSSA since 1948.[11] The record of this case contains what may be the most explicit agreement ever to create evidence for use in a federal court:

> Mr. Sims. "[E]ver since this three-judge court case was filed in 1970, the evolution of the Supreme Court's interpretation of the equal protection clause as applied to sex discrimination has been sort of extraordinary—would be a good word for it. It has come a long way, and the Justice Department, although we will make every conceivable effort to defend the constitutionality of the existing law, as I stated earlier, *we can use all of the help we can get,* and let me reemphasize the fact that the courts have shown a great deal of deference to Congress takes no responsibility whatsoever off of your shoulders and the administration's shoulders *now to address these issues very squarely* and resolve them as they should be resolved.

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10 *See also,* R963, 1042-45.

11. "The issue is now back before Congress, and *speaking solely for the Department of Justice as litigator,* it should be fairly obvious to this committee that the defensibility of the all male draft is something which *Congress perhaps should speak out clearly and formulate the kind of record* if, indeed, it chooses to reject the Administration's proposal, *which will be helpful rather than hurtful in the litigation.*" (emphasis supplied) (R1045)

> Mr. White. "I think we have made a pretty good record for you, and if you are looking for back-up information or evidence, I think it is there throughout this hearing. Don't you feel so, Mrs. Holt?
>
> Mrs. Holt. "Yes." (R1069) (emph. supplied) [12]

2. The Facts Found By the District Court

The District Court carefully reviewed each of Appellant's factual contentions at trial, tested them against the record made both before Congress and in this case, and rejected each. (Jur. St., 24a-43a).

The primary justification for male-only registration advanced by Appellant is that registration of both women and men would "den[y] the military the flexibility it obtains through an all-male draft and conscription." (Jur. St., 15).

The District Court, however, found that "it is the antithesis of 'flexibility' to exclude women from the pool of registrants." (Jur. St., 43a). The support for those findings is overwhelming, and is largely the undisputed testimony of the Government itself.

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12. When asked by the House subcommittee whether a deferential standard applies to sex-discrimination cases in the military, Mr. Sims replied:

> "Let me also say this sharp distinction [between the military and civilian contexts] you are talking about is not quite as sharp as I wish it would be from the standpoint of somebody trying to defend the Selective Service Act of 1949 (sic). Indeed, the language that we rely on most heavily in our opinion, Mr. White, from *Schlesinger vs. Ballard* is clearly different in that case, and it *says in an opinion issued by the Supreme Court that not one of them has suggested that it ought to be a decision based upon defering* (sic) *to military needs.*
>
> "So, while we are prepared to make that argument, I am not nearly as confident and I don't think the sharp distinction you are talking about has been drawn in *any* court cases of which I am aware." (emph. supplied) (R1070-71).

Now the Government is telling this Court that *Schlesinger v. Ballard* did defer to military needs in adopting a "rational relationship" test for military sex discrimination. (Jur. St., 6, 7-8).

Appellant contends, based upon S. Rep. 96-826, that there would be no need for female conscripts in a mobilization, because the need would be for combat troops; women would not be combat troops; and enough women would volunteer for non-combat roles to meet the needs which can be filled by women.

The record before Congress and in this case refutes Appellant's contention. There may be a shortage of personnel in combat positions in time of war, even as there is in peacetime.[13] However, due to the number of support troops (who can be women) necessary for each combat soldier,[14] one immediate problem in a mobilization is "a deficiency in the ratio of support forces in the Army to combat forces."[15] Where the need to raise large numbers

13. The quotation from S. Rep. 96-826 relied upon at Jur. St., 13 to establish the need for draftees in combat positions is explicitly limited to *peacetime conditions.*

14. Jur. St., 32a, n. 23. Even in the basic Army infantry division nearly two-thirds of the troops serve in a support capacity. *Report by the Special Subcommittee on the Utilization of Manpower in the Military of the House, Committee of Armed Services,* 92nd Congress, 2d Sess. 14658 (1972). During the Vietnam War, only 14.1% of the troops were in ground combat occupation groups. *Statistical Abstract of the United States (1971),* p. 255. (R1808).

15. General Rogers testified:

> "Mr. Chairman, we found, in fact, a shortfall in the number of combat service support units necessary to support the combat forces under the contingency conditions which were played in Nifty Nugget, the mobilization of 1978. Such a shortfall means, as far as the Army is concerned, dependence upon host nation support and dependence upon Reserve Component units which contain 67 percent of our Army support forces."

Testimony of Army Chief of Staff, General Bernard W. Rogers, to the Senate Subcommittee on Manpower and Personnel, March 13, 1979 (R1213-14).

Accord, testimony of the other Chiefs of Staff. (R1214-15).

In his March 5, 1980 testimony to the House Subcommittee on Military Personnel, Assistant Secretary of Defense Pirie made the same point:

of non-combat troops is even a possibility, the *exclusion* even from consideration of a large number of those people best qualified for such roles is unjustifiable.

Appellant's reliance upon the subcommittee majority's conclusion that "military needs that can presently be satisfied by women are already met by women volunteers, whose numbers have been steadily increasing"[16] is similarly without import for this case. The ability to meet peacetime quotas with volunteers is irrelevant to the ability to meet wartime needs with volunteers.[17] Again, exclusion of a pool of persons who could be conscripted *if needed* is certainly not supported by either adequate or inadequate numbers of volunteers.

Nor does wartime recruitment experience support the subcommittee's sanguine view. The District Court noted:

> "With the advent of the Korean War an unsuccessful effort was made to recruit some 100,000 women to meet rapidly expanding personnel requirements. Dept. of Defense, Background Study—Use of Women in the Military at 3 (2d Ed. 1978). It is very possible that the utilization projection for women may not be filled solely through volunteers, just as the nation's total needs may not be filled by volunteers. That is the

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15. (Cont'd.)

> Mr. Pirie. "Not only will we need to expand combat arms, as I say, that is the pressing need, but we also have to expand the support establishment at the same time because that meets the situation where the combat arms can carry out their function successfully, and the support establishment now uses women very effectively, and in wartime I think the same would be true."

(Jur. St., 40a, n. 30).

16. Jur. St., 13.

17. Actually, while the Army is now increasing its peacetime recruitment goals for women, it is having difficulty in meeting those goals. As General Rogers testified, the Army was experiencing a twenty-five percent shortfall in female recruitment in fiscal year 1979. (Jur. St., 39a, n. 29; R1220).

reason for a selective service system. (Jur. St., 31a, n. 22).

Refutation of the Government's newly-found argument that flexibility of personnel management dictates male-only registration began even before the MSSA was enacted. As General of the Army Dwight D. Eisenhower testified in the hearings on WASIA:

> "Like most old soldiers I was violently against women soldiers. I thought a tremendous number of difficulties would occur, not only of an administrative nature . . . but others of a more personal type that would get us into trouble. None of that occurred . . . in the disciplinary field they were . . . a model for the Army. More than this their influence throughout the entire command was good. *I am convinced that in another war they have got to be drafted just like men.*" Hearings on S1614 Before The Subcommittee on Organization and Mobilization of the House Committee on Armed Services, 80th Cong., 2d Sess. No. 238 at 5563-64 (1948) (emph. supplied).[18]

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18. The position of our military leaders over the years has been notably consistent on this point since the War Department first recommended registration of women in 1942. *Beans,* Sex-Discrimination in the Military, 67 Military L. Rev. 19 (1975). On October 25, 1977 then Chairman of the Joint Chiefs of Staff, General Bernard W. Rogers, stated that serious consideration had to be given to drafting women in view of "the great job that they are doing." (R541). On the simpler issue of *registering* women for the draft, General Rogers was emphatic. When asked whether women should be included in any future registration, he replied:

> "[W]omen should be required to register for the reason that General Wilson mentioned, which is in order for us to have an inventory of what the available strength is within the military qualified pool in this country. That is my opinion."

The District Court noted and relied upon General Rogers' testimony. (Jur. St., 39a, n. 30).

The District Court found that a special skills draft could be used to maximize the *positive* impact on military flexibility which would come of registering women. (Jur. St., 37a, n. 27). Support for that proposition was firm even before the MSSA. In 1945, President Roosevelt submitted to Congress the Nurses Selective Service Act of 1945, proposing the *induction* of twenty-thousand (20,000) female nurses. Nurses Selective Service Act of 1945, H. Rep. 194, 79th Cong., 1st Sess. (1945). That Act *passed* the entire House of Representatives; and only the end of the war in Europe, with its resulting lessening of the need for nurses, prevented the enactment of America's first female draft. Nurses For The Armed Forces, S. Rep. 130, 79th Cong., 1st Sess. (1945).

In 1951, Congress had recognized the need for more women in the Armed Forces in time of war than in time of peace.[19] In 1980, Assistant Secretary of Defense Robert B. Pirie testified at deposition that the number of women in the Armed Forces would have to increase in time of war, even beyond the 250,000 women goal for the peacetime forces. (Jur. St. 31a-33a, n. 25). There is no reason to believe, and neither Congress nor any of its committees ever found, that optimal utilization of women in time of war could be achieved without being able to draft women. The District Court's finding that the authority to register women, and thus the ability to induct them, enhances military flexibility and effectiveness is thus uncontested on the record.

A further problem with the Government's reliance upon S. Rep. 96-826 is that the answer requested by Mr. Sims is to the wrong question. As often as Mr. Sims and

19. "No compulsory military service for women is contemplated. However, the services indicated that more women could be used to replace men if the present ceiling of 2 percent on women in the Armed Forces were lifted. The Air Force indicated they could use up to 10 percent women; the Navy and Marines could use 7 percent women 'in time of war'." S. Rep. 117, 82nd Cong., 1st Sess., 7 (1951) (R1732).

others told the subcommittee that "the question of military necessity for drafting women is irrelevant to the Constitutional issue,"[20] the subcommittee majority still wrote that:

> "There is no military need to include women in a selective service system." (R880).

Whether or not that is true, to sustain the statute it is not enough to show that "their inclusion was [not] needed; it would have to be shown that their exclusion was needed." (Jur. St., 21a). There is simply *no* evidence that the *exclusion* of women from registration meets any military need.[21]

The District Court found, simply, that the military does not lose flexibility if women are registered. (Jur. St., 42a). Again, the finding is supported by testimony directly on point. The theoretical constraints which limit the percentage of women who could serve in units open to women, and thus limit the number of women who would be drafted in the most extreme war scenarios (expressed in terms of "flexibility" and "rotation" by Appellant (Jur. St., 28a-43a)), were all taken into account by the Department of Defense and by the Armed Forces themselves in generating plans which call for the conscription of 80,000 women as most consistent with the objective of raising the most effective force. (Jur. St., 42a, n. 31). Indeed, since 1948 Congress has itself been a prime mover in expanding

20. R920-21. See also the testimony of Appellant Rostker (R903); testimony of Principal Deputy Assistant Secretary of Defense Danzig (R921-22); and the dissenting views of Senator Cohen. (R886).

21. Yet that is what the Government must prove in this lawsuit. (R20a-22a). The Government is evidently aware that S. Rep. 96-826 spoke to the wrong question, because it knew that the *right* question was whether

> "there is a military necessity not to register [women] . . .
> That is the burden we will carry . . .

Testimony of Mr. Sims to House Subcommittee on March 5, 1980. (R1046).

the role of women in the military, and the military's dependence upon women.

In the mid 1970's, over the objections of the Services which wanted to reserve all service academy positions for officers who could lead combat troops, Congress opened the service academies to women. *E.g.*, 90 Stat. 2708, 14 U. S. C. § 182(a):

> "All such appointments shall be made without regard to the sex, race, color, or religious beliefs of an applicant."

In 1978, Congress abolished the Women's Army Corps as a separate entity within the Regular Army,[22] thus completing the integration of the Regular Army begun in 1948. In so doing, Congress repealed the combat exclusion for women in the Army, thus leaving to the Army itself the matter of deployment of women in the Army.[23] Even in the Navy and Air Force, where combat exclusions still exist, Congress now permits the Secretary of the Service to designate any member of the service to perform any function requiring "special training or experience," a designation exempt from the combat exclusion. *E.g.*, 10 U. S. C. § 8067(i). Moreover, Congress has consistently voted the funds necessary to recruit and train ever more women for their increasingly prominent role in the military. (Jur. St., 39a).

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22. 92 Stat. 1627, repealing 10 U. S. C. § 3071.

23. Assignment restrictions tending to keep women out of combat still exist for other services. E.g., 10 U. S. C. § 6015 (Navy); 10 U. S. C. § 8549 (Air Force). The Air Force exclusion pertains to crews of combat aircraft, who must be officers, and is therefore not relevant to restrictions on enlisted personnel. The services have requested Congress to repeal those limitations. *Statement by Robert Pirie*, 13 Nov. 1979 (R1078-1086). Even those existing exclusions are not complete. For example, female Air Force doctors, lawyers, chaplains, dentists, veterinarians, nurses and medical specialists are exempt from the combat exclusion under 10 U. S. C. § 8067. Congress itself modified 10 U. S. C. § 6015 after it was held unconstitutional in *Owens v. Brown*, 455 F. Supp. 291 (D. D. C. 1978).

History thus supports the statement that Congress has never itself made a considered judgment that women in the services are in any way inconsistent with military flexibility. Indeed, with the "incongruous" exception of registration for conscription, the legislative trend has been to concur with or even to go beyond the judgment of the professional military and civilian defense establishment in utilizing females as well as males in meeting military needs.[24] Utilization of males and females in ways consistent with professional military judgment is precisely the result which Appellees sought and the District Court decreed in this case.

E. The 1980 Presidential Proposal to Register Women

Congressional failure to amend the MSSA in 1980 is irrelevant to any justification for the 1948 statute. However, the record made in the 1980 hearings contains many facts demonstrating the *positive* correlation between gender-blind registration and military flexibility, as found by the District Court. *See* Section IV(D), *infra.*

The President, whose Proclamation No. 4771 (July 2, 1980) caused the registration of nearly four million young men in the two weeks following July 21, 1980, initially proposed amending the MSSA to provide authority for female registration in his *Presidential Recommendation For Selective Service Reform: A Report To Congress Pursuant to P. L. 96-107* (Feb. 11, 1980).[25] The President "decided to seek authority to register, classify and examine women for service in the Armed Forces" because of their successful service today and after full consideration of present combat exclusion policies and of the fact that a "substantial number of support jobs must be reserved for men so that they will be available if needed as close combat replacements."[26]

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24. Jur. St., 37a, 38a.

25. "Presidential Recommendations." (R196).

26. R201.

Just as plaintiffs urged and the District Court found,[27] the President concluded:

> "Equity can be achieved by registering both men and women and then providing that they serve in proportion to the ability of the Armed Forces to use them effectively. Conscriptions would be based upon actual military personnel needs at the time." (R201).

The President found male-only registration and induction "inequitable" in view of the exemplary performance of women in their expanded role in today's military. Presidential Recommendations, 26-27 (R223-24).

On March 5 and 19, 1980, hearings on the President's proposal to amend the MSSA were held before the Subcommittee on Military Personnel of the Committee on Armed Services of the House of Representatives and the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. Representatives of the Department of Defense, Office of Management and Budget, and the Director of Selective Service testified in support of the proposal.

The Director of Selective Service, Appellant here, urged the subcommittees to support the registration of women:

> The fundamental task of the Selective Service System is to determine in a fair and consistent way who will go . . . . I think it behooves us then to have as a large a base as possible commensurate with the jobs that the Defense Department requires to be done, and the skills and abilities of the people who are available to do those jobs.

Stenographic Transcript of Hearings before the Committee on Armed Services Subcommittee on Military Personnel, House of Representatives, March 5, 1980, at 23. (R1049).

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27. Plaintiffs' Proposed Findings of Fact, No. 45; Jur. St., 42a-43a.

Assistant Secretary of Defense, Robert Pirie, expressing the official Defense Department position, testified that it is in the interest of national security that in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. He advised that "the performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women . . . . [Those women] should be available for service in the jobs they can do, just as men will be available for jobs they can do." (R1033).

He also explained that there are currently 150,000 women on active duty in the Armed Forces. By 1985, the services project that there will be 250,000. In the event of a mobilization, the Department of Defense would require approximately 650,000 inductees and it would be advantageous to the military if 80,000 of these were women. (Jur. St., 31a).[28]

Principal Deputy Assistant Secretary of Defense Danzig stated the Department of Defense position at his deposition: even taking into account that many people drafted for support positions might be redeployed to combat roles, military effectiveness is best served by drafting at least 80,000 women. He emphasized that there is no valid reason for "the total exclusion of women" from registration. (R1615-16). *See also* Jur. St., 39a-40a, n. 30. So much for Appellant's conclusory hypothesis of a negative impact of registering women upon military flexibility.

The final argument advanced in the Jurisdictional Statement, that of "monumental strains on the training

28. The testimony of Assistant Secretary Pirie and other senior civilian and military officials is further described at Section IV(D), *infra*, and by the District Court at Jur. St., 37a. There is even ample evidence in the record that concentrations of females in combat support units far in excess of what is actually contemplated by the Army would not decrease unit performance, even under extended field conditions. *America's Volunteers*, 76-7 (R299-299A).

system," is directly refuted by S. Rep. 96-826 itself, because the finding was said to be valid only,

> "[i]f the law required women to be drafted in equal numbers with men . . . ." (R881).

Neither the Pentagon, the Service Chiefs, the plaintiffs below, nor the District Court, argued that such inflexible induction allocation was necessary. As Appellant Rostker himself testified on deposition, there are *no administrative obstacles* to a both-sex registration or draft, supplying whatever proportion of women the military might request. (R1369-70) [29]

The record proves in overwhelming detail that the District Court was entirely correct when it found it "incongruous" to "expand the utilization of women in the military" while not considering them for inclusion in conscription. (Jur. St., 38a). The inconsistency can only be explained by reference to paternalistic sex-stereotyping, elevated above even the optimization of military effectiveness.

It is thus on fragmentary, after-the-fact conclusions of a handful of Congressmen and Senators, conflicting even with the evidence before them and before the District Court, that Appellant seeks to defend male-only registration.

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29. The Military Personnel Subcommittee of the House Armed Services Committee, by a vote of 8 to 1, tabled the recommended amendment to the MSSA which would have imposed the registration requirement on women as well as men; and the Manpower and Personnel Subcommittee of the Senate Armed Services Committee rejected the Administration's proposed amendment, by a vote of 5 to 2, and issued S. Rep. 96-826. On June 26, 1980, Congress appropriated $13,285,000 to reinstitute draft registration. H. R. Res. 521. On July 2, 1980, President Carter issued Proclamation No. 4771 ordering only male citizens and resident aliens of the United States who were born in 1960 or 1961 to register for the draft beginning on July 21, 1980.

III. SUMMARY OF ARGUMENT

All young men, fit or unfit, but no women however fit to serve, are compelled to register for potential conscription into the Armed Forces. Lacking any genuine justification in military or other considerations, this is an invidious discrimination from which the Due Process Clause of the Fifth Amendment should provide relief. The General Counsel for Selective Service himself opined that "to meet current constitutional law requirements, any system of registration for and induction into the armed forces must include both men and women." *Improving Capability To Mobilize Military Manpower: A Report By The Director of Selective Service—Draft Working Document,* 16 Jan. 1980, p. 27 (R1802).

Governmental decisions to subject men alone to a burden from which women are automatically exempt deny equal protection and hence violate due process unless they "serve important governmental objectives" and are "substantially related to the achievement of those objectives." *Craig v. Boren,* 429 U. S. 190, 197 (1976). *See also, Orr v. Orr,* 440 U. S. 268, 279 (1979). When the burden in question is compulsory registration for the pool of potential military draftees, at least that standard of review applies, because registration places in jeopardy basic personal liberties and ultimately life itself. Which groups will be placed in jeopardy and which groups never threatened requires a standard of special sensitivity. *Cf., Hampton v. Mow Sun Wong,* 426 U. S. 88, 102-03 (1976). This Court has never countenanced either the confusion or the inequity that would accompany any effort to carve out special exemptions from the unitary standard articulated in *Craig* for gender-based classifications. The fact that conscription diminishes fundamental liberties of the draftee also requires heightened scrutiny of the manner in which that burden is imposed.

Schlesinger v. Ballard, 419 U. S. 498 (1975), found "complete rationality," *id.* at 509, in the Navy's willing-

ness to give female officers more time than dissimilarly situated male officers to win promotion before being discharged under an "up or out" system. Nothing in *Schlesinger* supports reduced scrutiny of rules bearing on the military. The Navy's differential treatment of those unpromoted men and women was carefully designed to offset the reduced opportunities for promotion of the affected women, and was carefully tailored so as *not* to apply where equal assignments and promotion opportunities were open to both sexes. In upholding such differential compensatory treatment, this Court suggested no special deference to military needs or judgments.

On the contrary, as the Government concedes, nondeferential scrutiny was applied by this Court in striking down a gender-based discrimination in the compensation scale for military personnel, *Frontiero v. Richardson,* 411 U. S. 677 (1973), a matter bearing directly on military incentives and morale—and a matter wholly internal to the military. If a heightened standard of equal protection review is required even in that setting, one which involves internal military management, it is plain that the Court's relatively relaxed scrutiny of restraints on political liberty *within military enclaves* [30] should not be imposed as a similarly uncritical equal protection standard here. Military enclave cases are peculiarly inapposite to this case, for we deal here with discriminatory rules that are directed not at military personnel but entirely at civilians—rules linked with the military only indirectly, through their effect upon the pool of registrants from which draftees may be selected by a civilian agency in accord with the Armed Forces' expressed needs. There is no precedent for the problems of principle and practice that would attend the Government's proposed dilution and fragmentation of standards for the judicial review of official gender discrimination.

Whatever the proper standard of review, it is clear that the decision by Congress in 1948 to authorize the registration of men but not of women cannot survive scrutiny.

30. *See, e.g., Brown v. Glines,* 100 S. Ct. 594 (1980).

Presidents since Franklin Roosevelt and military leaders since Dwight Eisenhower have sought to break down the total exclusion of women from registration. Most recently, both the President as Commander-in-Chief and the leaders of the entire military establishment have stated that excluding all women from registration is not only inequitable but militarily and economically senseless, and even counterproductive.

That this is so becomes evident as soon as one reflects upon the irrationality of registering only men—fit and unfit—for a military pool that excludes age-qualified persons on no ground but gender, while it supplies potential draftees for a military force increasingly composed of women as well as men.

More particularly, both the military and Congress have made concerted efforts over the last decade to increase the role of women in the Armed Forces. These efforts obviously would not have been undertaken if military policymakers and legislators thought that expanded roles for female soldiers were inimical to an effective national defense. Moreover, defense experts have testified before Congress and before the court below that the inclusion of women in draft registration would enhance, rather than diminish, military flexibility—something that could be particularly important in an emergency situation, when many of the best qualified individuals for non-combat roles would be women and their availability would free more combat trained soldiers for quicker redeployment to battle.

Second, even the desire to keep females from participating in the full range of combat roles could not justify the complete exclusion of women from draft registration. The various combat exclusions for females, many of which are being relaxed, are not at issue here; most military assignments in war or peace are of a non-combat variety. The most authoritative estimates from the Pentagon indicate that tens of thousands of positions remain open for women draftees—even after the military's rotation goals are satisfied and the probable number of female volunteers is taken

into account. The alleged inconvenience in having to subdivide registrants into combat and non-combat pools is already inherent in the challenged registration system, which requires all age-eligible men—even those who are clearly incapable of combat service—to register. The Director of Selective Service, Appellant in this Court, has testified that there would be no additional burden in registering women.

Third, it is constitutionally irrelevant that it may be "unnecessary." to include women in the sense that enough men are available to fill all military positions. The fact that it might not be necessary to *include* a group of individuals obviously does not mean that *excluding* that group sufficiently serves some substantial end to pass constitutional muster.[31]

In sum, any fear that military flexibility and effectiveness will be hindered by the inclusion of women in the pool of registrants is wholly unfounded. Evidence demonstrating the successful performance of women soldiers has been so convincing that Congress and the military have consistently attempted to recruit more women. The pointlessness of all-male registration was evident to the court below from the evidence provided through the Government's own experts and through the judgments expressed both by Congress and by the military in their attempts to increase the participation of women. The lower court's review of all-male draft registration system thus did not supplant legislative judgments with judicial policymaking. Rather, such review—which is characteristic of searching examination of legislative motivation in other sex discrimination cases mandated by this Court—exposed the justifications offered for not registering women as merely

31. No mention of any of the rationalizations for male only registration cited by the Government appears anywhere in the history of the MSSA and thus must be regarded as *post-hoc* justifications, which are irrelevant in gender discrimination cases. See, Section IV(B), *infra*.

after-the-fact rationalizations never actually entertained by Congress, but supplied solely for litigative purposes.

Because this gender-based classification is the product of nothing beyond the archaic—and no longer even arguably defensible—idea that men are meant for war and women solely for the home and hearth, an exclusively male registration for the military draft merely perpetuates the ancient sexual stereotypes that this Court has consistently condemned as carriers of self-fulfilling prophecy. The lower court's decision should thus be summarily affirmed.

IV. ARGUMENT

A. Male-Only Registration Must Pass the Heightened Scrutiny Applied to Gender Discrimination Cases

The district court "combed the record and the legislative history for purported justifications for the total exclusion of women from the MSSA", and found "each proffered justification unconvincing." Jur. St., 23a. It therefore held that the male-only draft registration mandate failed to meet the heightened standard of review for gender-based classification first enunciated by this Court in *Craig v. Boren,* 429 U. S. 190 (1976). Appellant acknowledges that gender based classifications must ordinarily be judged under this standard. (Jur. St., 8-9). But Appellant then attempts to avoid the *Craig* standard in this case by carving out an exception for "statutory classifications geared to national defense needs", where deferential "rational relationship" scrutiny would apply. (Jur. St., 7-8).

Appellant's argument rests solely on the inapposite *Schlesinger v. Ballard,* 419 U. S. 498 (1975), and virtually ignores *Frontiero v. Richardson,* 411 U. S. 677 (1973), this Court's only precedent actually ruling on sex-discrimination in the military. (Jur. St., 9, n. 10). On analysis, both cases and the Court's other precedents demonstrate that the District Court's application of the heightened

standard of review announced in *Craig* and applied uniformly to test gender discrimination since 1976 was in all respects proper.

On the other hand, adoption of such an exception would further complicate equal protection jurisprudence, and would cause great uncertainty when the classification is based on more than one constitutional power, or when the source(s) of the power is unclear. Moreover, even if it were conceivable that the Court might carve out such an unprecedented and unworkable exception for classifications which directly and substantially affect the internal operations of the military, it should not do so in the limited circumstances of this case, where the classification has nothing to do with the internal operations of the military, and instead directly affects an entire civilian population of persons not yet part of the military or subject to military control.

1. Gender-Based Classifications Are Appropriately Judged Under a Standard of Heightened Scrutiny.

In *Craig v. Boren*, 429 U. S. at 197, the Court held that, "[t]o withstand constitutional challenge, . . . classifications by sex must serve important governmental objectives and must be substantially related to those objectives."

Starting at least with *Reed v. Reed*, 404 U. S. 71 (1971), this Court has held that rationally serving "legitimate" objectives (in *Reed*, reducing the workload of probate courts and avoiding familial controversies) was not sufficiently important to justify gender-based classifications. Two years later, as Appellant concedes, *Frontiero* applied a test of "heightened scrutiny" to a statute governing personnel matters entirely internal to the military. (Jur. St., 8).

The explicit requirement in *Craig* of an elevated review standard for gender-based classifications simply summarized and confirmed this Court's evolving precedents. *See also, Stanton v. Stanton*, 421 U. S. 717 (1975). Since

Craig, the Court has repeatedly reaffirmed the principle that gender-based legislation must be tested by this more stringent standard. *Wengler v. Druggists Mutual,* 100 S. Ct. 1540 (1980); *Califano v. Westcott,* 443 U. S. 76, 89 (1979); *Orr v. Orr,* 440 U. S. 268, 279 (1979); *Califano v. Webster,* 430 U. S. 313, 316-17 (1977); *Califano v. Goldfarb,* 430 U. S. 199, 210-11 (1977). *See also Personnel Administrator of Massachusetts v. Feeney,* 442 U. S. 256, 273 (1979) (explicit gender classification requires "exceedingly persuasive justification"). Last term the Court made clear that "[t]he burden is on those defending the discrimination to make out the claimed justification." *Wengler v. Druggists Mutual,* 100 S. Ct. at 1546.

Since *Reed,* the Court has also made clear that in scrutinizing legislative gender classifications it applies two basic principles. First, over-broad generalizations concerning one sex or the other no longer can be used to substitute for functional, gender-neutral means of distinguishing between classes of individuals,[32] *Orr v. Orr,* 440 U. S. at 279 (1979); *Califano v. Westcott,* 443 U. S. 76 (1979); *Califano v. Goldfarb,* 430 U. S. at 88 (1977), and the same standard will apply whether the sex discriminated against is male or female. *Orr v. Orr,* 440 U. S. at 279; *Wengler v. Druggists Mutual,* 100 S. Ct. at 1547.

Second, the Court has consistently rejected use of "sex as a proxy for need" in furthering even important legislative objectives.[33] In *Orr,* for example, the Court

32. Patterning legislation to match those stereotypes is particularly pernicious, for it casts the weight of government on the side of the stereotype. It manifests a legislative assumption that the stereotype not only is, but will and ought to be, accurate. *Stanton v. Stanton,* 421 U. S. at 14-15. *See also* Johnson & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 *N. Y. U. L. Rev.* 675, 725-26 (1971).

33. Notwithstanding the MSSA's reference in § 1(c) to both "obligations and privileges" of conscriptive service, involuntary registration and conscription is in large measure a burden, whose lifting from women is viewed as a favor by some. But deeper reflection reveals the paternalistic attitude motivating the "exemption" of

held unconstitutional an Alabama alimony statute which authorized the imposition of alimony obligations on husbands, but not on wives.

In short, Appellant's argument for application of the rational relationship test to Section 3 of the MSSA flies in the face of the consistent evolution during the past decade of a stringent standard of review for legislated gender classifications. This Court recently summarized this steady course of its judgments:

> Classifications based upon gender not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. . . . This Court's recent cases teach that such classification must bear a close and substantial relationship to important governmental objectives. . . .

Personnel Administrator of Massachusetts v. Feeney, 442 U. S. at 273.

2. Schlesinger v. Ballard Neither Applies Nor Supports the Application of the Rational Relationship Test to Gender Distinctions in This Context.

Appellant's sole authority for the application of a minimal scrutiny standard to sex discrimination "geared

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33. (Cont'd.)

women from military duties. Such "protection" denies women equal political stature with men. *See,* Ruhn, Constitutional Law—Equal Protection—Sex Discrimination—Selective Services Laws, [1976] *Wis. L. Rev.* 330, 347. The nexus between exclusion from the military and second-class citizenship has long been recognized. From history of Europe, which reveals that only the political elite were allowed to bear arms or serve as military leaders, to our own past, which demonstrates that there was resistance to blacks' full participation in the military, there has been consistent association of military service with full political rights. *See,* Goodman, "Women, War and Equality", 5 *Women's Rights Law Reporter* 243, 246-248 (1979). In no way has exemption from registration ever been viewed as, nor has the government ever argued that it is, remedial of past discrimination in the military or civilian spheres.

to national defense needs"[34] is *Schlesinger v. Ballard.* In this Court, the Government argues that *Schlesinger* applied the "rational basis standard."[35] In the District Court, the Government more accurately characterized *Schlesinger* as a case where "the Court did not specify the standard of review it was applying."[36] Of course, the Government's most accurate description of *Schlesinger* was to Congress, where it described the case as one in which not a single Justice accepted the argument that the decision employed a standard "based upon defering (*sic*) to military needs."[37] In fact, there is not one word in *Schlesinger* or in any other opinion of this Court which suggests that the standard of review might vary depending upon the clause of Article I, § 8 exercised in legislating.

At trial, the Government urged *Schlesinger* as supporting a rational basis test in cases involving military matters. After careful analysis, the trial court correctly rejected that argument. (Jur. St., 18a-19a). As the district court noted, *Schlesinger* was a case where (1) there was no disparate treatment of similarly situated individuals, and (2) this Court expressly rejected administrative convenience as a basis for the different treatment of even dissimilarly situated males and females. The trial court's analysis is plainly correct. If *Schlesinger* supported Appellant's extraordinary reading, it would have overruled *Frontiero,* which did apply heightened scrutiny to legislation passed under the power to raise and support armies. However, the continuing vitality of *Frontiero* is

34. Jur. St., 8.

35. Jur. St., 7, 10.

36. Since the classes were dissimilarly situated it was unnecessary for the Court to articulate or apply any equal protection standard. The case was decided on grounds which obviated the need for any equal protection analysis of the Government's proffered justification of the dissimilar treatment.

37. R1070-71, cited *supra,* n. 12.

attested to by this Court's citation of it in both *Schlesinger*, 419 U. S. at 506 and *Craig*, 429 U. S. at 198.

In *Schlesinger*, certain male Naval officers had only nine years in which to be promoted or be involuntarily discharged, while female officers of similar grade had thirteen years to secure promotion. But because legislative and policy restrictions prevented the female officers from having shipboard assignments or combat duty which would lead to more rapid and favorable consideration for promotion, the males and females issue were not similarly situated. 419 U. S. at 508. This contrasts sharply with the situation in *Reed*, where the statute preferred men over otherwise "similarly situated" women,[38] and in *Frontiero*, where the statute mandated "dissimilar treatment for men and women who [were] similarly situated."[39] Significantly, *Schlesinger* stresses Congressional reliance on the dissimilar situation because where male and female officers were eligible for equivalent assignments, "Congress has not differentiated between them with respect to tenure." 419 U. S. at 509.

This Court has repeatedly emphasized that *Schlesinger* was a judicial response to a situation where the discriminatory assignment regulations had left the sexes "not similarly situated," and left women disadvantaged. Thus the alleged discrimination in *Schlesinger* was the recognition and partial redress of an existing imbalance in the opportunities afforded men and women in the Navy. *Orr v. Orr*, 440 U. S. at 281; *Califano v. Webster*, 434 U. S. at 317-18 (1977).

Even disparate treatment between men and women who were *dissimilarly* situated had to pass a much more rigid test in *Schlesinger* than the Government now urges for the admitted[40] discrimination in this case. "Administrative convenience" has often sufficed as justification for

38. 404 U. S. at 77.

39. 411 U. S. at 690-91.

40. Answer to Complaint, ¶ 29 (R13).

statutory classifications reviewed under the rational relationship test.[41] It is insufficient under heightened scrutiny. *Reed,* 404 U. S. at 76. It was specifically rejected in *Schlesinger,* even as a basis for differentiating between *dissimilarly* situated men and women. 419 U. S. at 510. The "complete rationality", *id.* at 509, of the legislative distinction required in *Schlesinger* plainly looks beyond the rational relationship test urged by Appellant.[42]

Schlesinger is inapplicable to the instant case for another reason which calls for the application of heightened scrutiny here. The burden of the "up or out" promotional system in *Schlesinger* did not infringe upon anyone's fundamental rights. By contrast, it is undeniable that conscription necessarily causes a general diminution of the fundamental rights of the conscript. *Raderman v. Kaine,* 411 F. 2d 1102, 1104 (2d Cir. 1969); *United States v. Offord,* 373 F. Supp. 1117, 1118, (E. D. Wis. 1974).[43] Registration puts into jeopardy those rights which

41. Jur. St., 18a-19a.

42. In *Schlesinger,* the Court relied upon the self-correcting nature of the legislative process. 419 U. S. 510, n. 13. Here Congress has failed to enact all proposals to cure the discrimination by legislation, and it is clear that only the courts can uphold the Constitution in this situation. *Cf., Frontiero,* 411 U. S. at 692 (Burger, C. J., concurring). *Compare, Reed,* 404 U. S. at 74, n. 4.

The significance of the *Schlesinger* Court's explicit rejection of the rationale of the rational relationship test, and its implicit rejection of the test itself, is underscored by the fact that in *Schlesinger* the Solicitor General also urged a military exemption to heightened scrutiny. *Schlesinger v. Ballard.* Brief for Appellant, p. 20. Even the argument urged on the Court here is familiar.

> "[i]t is particularly important in the context of this case that the courts accord to the legislature significant flexibility as to classification based on sex, because the issue here relates closely to the organization, maintenance and effectiveness of the armed forces." *Schlesinger v. Ballard,* Brief for Appellant, 9.

43. For example, service regulations may require prior base commander approval for circulation of petitions to Congress. *Brown*

are surrendered with induction. The constitutional issue presented is not diminished merely because the loss of those rights is not certain as to all members of the affected class. *See, Shapiro v. Thompson,* 394 U. S. 618, 634 (1969). Any classification or discrimination which imposes, directly or indirectly, a burden upon one group's enjoyment of fundamental rights is constitutionally suspect and must pass a "critical examination". *Zablocki v. Redhail,* 434 U. S. 374, 383 (1978). Indeed, in upholding the abridgement of the religious beliefs inherent in denying conscientious objection to a particular war, this Court required the burden to be "strictly justified by substantial governmental interests that relate directly to the very

43. (Cont'd.)

v. Glines; Sec'y of Navy v. Huff, 100 S. Ct. 606 (1980). The right to disseminate or receive otherwise protected political literature on military bases is curtailed in the military context. *Greer v. Spock,* 424 U. S. 828 (1976). Generally, "speech that is protected in the civil population," *Parker v. Levy,* 417 U. S. 733, 759 (1974), may be subject to prior restraint because "the different character of the military community and the military mission requires a different application of those protections." 417 U. S. at 758. Generally, "the rights of military men must yield somewhat ' "to meet certain overriding demands of discipline and duty" ' . . ." *Brown v. Glines,* (citations omitted) 100 S. Ct. at 599. The fact of service in the military or regulations imposed by the military authority diminish or regulate, in ways which would not be permitted in civilian life, fundamental interests such as the right to marry, *Zablocki v. Redhail,* 434 U. S. at 383; *Loving v. Virginia,* 388 U. S. 1, 12 (1967); the right to procreate, *Skinner v. Oklahoma,* 316 U. S. 535 (1942); the right to raise one's children in one's home, *Meyer v. Nebraska,* 262 U. S. 390, 399 (1923); the right to travel interstate, *Shapiro v. Thompson,* 394 U. S. 618 (1969); and the right to full procedural due process as the term is understood in civilian criminal proceedings, *Griffin v. Illinois,* 351 U. S. 12 (1956). See: *O'Callahan v. Parker,* 395 U. S. 258, 262-65 (1969), for a listing of the substantive and procedural differences between civilian and military due process, and the justification for the differences.

impacts questioned." *Gillette v. United States,* 401 U. S. 437, 462 (1971).

3. Frontiero Requires a Test of Heightened Scrutiny in This Case.

Schlesinger does not govern this case; *Frontiero* does. In *Frontiero,* the Court declared unconstitutional laws under which military men received a housing allowance and health care for their civilian wives while military women received these family benefits only if they supplied over three-quarters of the couple's support. Although these laws were within the ambit of the Congressional power "to raise and support" armies, Article I, § 8, cl. 12, the same clause under which the MSSA was passed, Appellant concedes that heightened scrutiny was applied in testing and rejecting the sex discrimination of those laws. (Jur. St., 8). By contrast, the promotion laws at issue in *Schlesinger* would seem to be based upon the power "to make Rules for the Government and Regulation of the Land and Naval forces. Art. I, § 8, cl. 14. The natural reference for the applicable standard for equal protection challenges to gender discrimination in statutes passed under clause 12 of Article I, § 8 is thus *Frontiero,* not *Schlesinger.*

Appellant's footnote attempt to distinguish *Frontiero* on the ground that the statute there related to "financial compensation", not "military preparedness" (Jur. St., 9, n. 10) misses the point. Promotion and compensation are two related facets of military personnel management, which largely determines the composition and preparedness of the Armed Forces, and also governs the internal workings of the military. Compensation and family living conditions, no less than promotion, intimately relate to the morale of military personnel. And morale, in turn, has an indisputable impact upon military effectiveness. When pay and benefits are critical to attracting and retaining suitable personnel, *Frontiero* is at least as much a military regulation case as is *Schlesinger.* So evaporates Appellant's proffered distinction of *Frontiero.*

Furthermore, the *Frontiero* classification involved economic regulation, to which reduced scrutiny has traditionally applied. Thus, in *Frontiero,* application of a deferential standard of review might have been expected, if gender based discrimination was not subject to heightened scrutiny even in the military. Since the Court did *not* accord the *Frontiero* statute unusual deference, it follows *a fortiori* that male-only registration—which is *not* economic regulation—should not be accorded unusual deference.

4. The First Amendment Military Precedents Are Inapplicable.

The Government's analogy to "First Amendment cases arising in defense contexts" (Jur. St., 10) fails to support minimal scrutiny of male-only registration. While it is true that considerations of military discipline and morale may justify a reduction in the breadth of exercise of a *soldier's* First Amendment rights, each military case cited by Appellant involved matters *wholly internal* to the military. *Brown v. Glines* was a challenge to Air Force regulations that require *members of the service* to obtain approval from their commanders before circulating petitions *on Air Force bases. Greer v. Spock* involved a ban on political speeches *on military bases.*[44] But registra-

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44. Reliance upon *United States v. Macintosh,* 238 U. S. 605 (1930) is misplaced. It was not a First Amendment Case. The issue was whether an applicant for citizenship had discharged his burden of proving that his views were not opposed to the principle that a duty of a citizen is to defend the country against all enemies, by force of arms when necessary. The Court, in reaching its conclusion that the applicant had failed to discharge his burden, made the following statement to which Appellant apparently alludes at page 11 of his Jurisdictional Statement:

> From its very nature the war power, when necessity calls for it exercise, tolerates no qualifications or limitations *unless found in the Constitution* or in applicable principals of international law. (emphasis added) 283 U. S. at 622.

tion under the MSSA is imposed only on civilians. 50 U. S. C. App. § 453. Selective Service is a civilian operation, regulating only civilians. An independent civilian agency[45] first screens from all registrants those who are eligible to serve; and then that same civilian agency further selects those of the eligibles who are needed to meet military requirements. Since conscription diminishes the rights of civilian citizens to those of soldiers[46] it is the burden imposed upon *civilian* males which is at issue in this case.

Where the rights of free civilians are even incidentally reduced by otherwise valid regulations of a constitutionally less protected group, full First Amendment scrutiny applies to the infringement on the communications. In *Procunier v. Martinez,* 416 U. S. 396 (1974), where the rights in communication of both prisoners and nonprisoners were at stake, the Court refused to relax the standard of review regarding censorship of prisoners' mail, as would have been applicable had the case involved purely internal prison messages. In response to the argument that a prisoner's rights to correspondence are fundamentally different from those of civilians, the Court was explicit:

> This line of argument and the undemanding standard of review it is intended to support fail to recognize that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail. 416 U. S. at 409.

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44. (Cont'd.)

Appellant's remaining case, *Snepp v. United States,* 100 S. Ct. 763 (1980), was a contract case in which explicit agreements not to publish information relating to the Agency or its activities without Agency approval were required of CIA employees as a condition of employment. *Snepp* would not support censorship of articles about the CIA published before the author had any relationship to the agency.

45. Selective Service System, 50 U. S. C. App. § 462(a).

46. See *supra,* at 29-30, n. 43.

Thus, even if induction under the MSSA is the interface of the military and civilian worlds, and registration of civilians is somehow elided into that interface, analogy to First Amendment doctrine not only fails to support Appellant's position but affirmatively supports application of the heightened review standard.

5. There Is No Reason in Policy or in the Constitution to Dilute the Standard of Review.

Quite apart from conflicting with prior precedents in this Court, the Government's argument would constitute a dangerously open-ended precedent. As the District Court pointed out:

> It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible constitutional violations committed by the Congress or the executive in exercising war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of citizens and therefore may be the one most in need of an appropriate check and balance. (Jur. St., 19a).

"There is only one Equal Protection Clause." *Craig*, 429 U. S. at 211 (Stevens, J., concurring). This Court has always been sensitive to the dangers of granting extraordinary significance to statutes "justified" under the war power or enacted for the national defense.[47]

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47. "Not one of these safeguards can the President, or the Congress, or the Judiciary disturb except the one concerning the writ of *habeas corpus*." *Ex parte Milligan*, 71 U. S. 2, 125 (1866).

See also Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U. S. 146, 156 (1919) (The war power of the United States, like its other powers and like the police powers of the states, is subject to applicable constitutional limitations); *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88-9 (1921); *United States v. Robel*, 398 U. S. 258, 263-64 (1967).

Far from "reassess[ing] the evidence" before Congress,[48] the District Court properly discharged its duty to ensure that statutes conform to the Constitution. *Marbury v. Madison,* 5 U. S. (1 Cranch) 137, 179-180 (1803):

> "From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of *courts,* as well as of the legislature.
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> • • •
>
> "It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank." (emphasis in original)

If the war power dictates undemanding examination of classifications which otherwise require heightened scrutiny, that must logically include deferential scrutiny of racial discrimination—without requiring any showing of "necessity" or "compelling interest". Under Appellant's theory, a draft registration limited to or excluding all blacks or Hispanics would face only minimal scrutiny on the theory that there is no military need for racial mixing. Similarly, the resegregation of present Army units could be defended under the rational relationship test as a purely internal military matter, administratively convenient because there have been racial incidents in integrated units.

In sum, Appellant seeks an unwarranted and unprecedented retreat from the elevated standard of review that was foreshadowed by *Reed,* applied in *Frontiero,* articulated in *Craig,* and repeatedly affirmed since. The argument should be rejected for what it is—an attempt to avoid the ineluctable result of the application of the

48. Jur. St., 6.

Craig standard to this case, without regard for history, precedent or policy.

B. The Judgment Below Should Be Affirmed Because the Deliberations of Congress in 1948 Disclose No Justification for Male-Only Registration in the MSSA

Even if the conclusions of the majority of the Senate Subcommittee on Manpower and Personnel, S. Rep. 96-826 (see p. 5, *supra*), were well founded in facts, such conclusions could not save the MSSA because consideration of "mobilization flexibility" played no role in its enactment. Under *Craig,* the *post-hoc* rationalization of a Congressional subcommittee in 1980 cannot be considered when a reviewing court assesses the constitutional adequacy of reasons for the exclusion of women from registration in a 1948 statute. 429 U. S. at 199, n. 7. Under heightened scrutiny, only evidence of actual legislative intent, reasons in fact expressed at the time of the passage of the challenged statute, may be invoked to defend discriminatory legislation. *Califano v. Westcott,* 443 U. S. at 86-88; *Weinberger v. Wiesenfeld,* 420 U. S. 636, 648 (1975).

Since, as is admitted in this case (*see* pp. 4-5 *supra*), Congress provided absolutely no reason for male-only registration in 1948, the gender discrimination in the MSSA can plausibly be explained only as:

> "part of the 'baggage of sexual stereotypes,' Orr v. Orr, 440 US, at 283, 59 L Ed 2d 306, 99 S Ct 1102, that presumes the father has the 'primary responsibility to provide a home and its essentials,' Stanton v Stanton, 421 US 7, 10, 43 L Ed 2d 688, 95 S Ct 1373 (1975), while the mother is the 'center of home and family life.' Taylor v Louisiana, 419 US 522, 534 n 15, 42 L Ed 2d 690, 95 S Ct 692 (1975). *Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment.*" *Califano v. Westcott,* 443 U. S. at 89 (emph. supplied).

Here it is admitted that there was no consideration of any proper purpose for excluding women in the history of the MSSA. Instead, as the District Court noted, upon undisputed evidence, the MSSA was enacted when "an aura of male chauvinism permeated Congressional attitudes toward women in the military." (Jur. St., 23a, n. 15). As in *Cleveland Board of Education v. LaFleur,* 414 U. S. 632 (1974), the "after-the-fact rationalizations proposed by [Appellant] are unsupported in the record."[49] as being what Congress actually had in mind when it enacted male-only registration.

C. The Judgment Should Be Affirmed Because Even the Subcommittee Conclusions Are Insufficient Under Any Standard to Justifying the Male-Only Registration Enacted in 1948

One of the differences between minimal and heightened scrutiny is that under the former analysis some amount of hypothesizing as to valid, but unexpressed legislative purposes is tolerated. But even that permissible deduction of purpose must be at least consistent with, and not refuted by, the legislative scheme and history under scrutiny. *Weinberger v. Wiesenfeld,* 420 U. S. at 648, n. 16.[50] Where legislative purposes are advanced in this Court to defend a classification from equal protection attack, the superficial plausibility of the rationale will not save the statute "when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."[51] It was precisely that exposure to logical and historical inquiry which refuted the argument of "flexibility of per-

49. *LaFleur,* 414 U. S. at 653 (Powell, J., concurring); *See also, Weinberger v. Wiesenfeld,* 420 U. S. at 648.

50. The District Court found that the hyptothesized justification of flexibility and military need was inconsistent with history and unsupported by fact in 1948 and in 1980.

51. Weinberger v. Wiesenfeld, 420 U. S. at 648, n. 16.

sonnel management"[52] as "superficially appealing, but . . . found lacking upon closer examination."[53]

Where the record demonstrates that illegitimate or insufficient objectives were at work when a statute was passed, the "initial primacy [of the historical purpose] casts its shadow" over the later adjudication of the constitutionality of the statute.[54]

Moreover, where the contemporaneous record of the enactment is silent as to the later proffered purpose, hypothetical justification will not avail where the impact upon the liberty of the burdened class is substantial. *Hampton v. Mow Sun Wong,* 426 U. S. at 115-16. The potential for injury to important "liberty" interests present in being a member of the class which must register for the draft is grave and pervasive.[55] *Califano v. Goldfarb,* 430 U. S. at 199. There is no room here for indulgence in the Government's hypotheses, particularly where the District Court has detailed both the history of the discrimination and the illogic of its newly devised justifications.

The fact that we deal here with gender discrimination in registration for conscription, a context which traditionally was viewed as a male preserve, makes the lack of explicit consideration by Congress[56] of any justification for male-only registration most telling, if not dispositive, as to the actual reasoning behind the provision. Mr. Justice Stevens' observation in dissent in *Mathews v. Lucas,* 427 U. S. 495, 520-21 (1976), applies with force in this case:

> "For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to dis-

52. Jur. St., 29a.

53. *Id.,* 30a.

54. *LaFleur,* 414 U. S. at 653 (Powell, J., concurring).

55. *Supra,* at n. 43.

56. R1713-14.

> tinguish between male and female . . . But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination to the stated purpose for which the classification is being made."

What makes this case so plainly ripe for summary affirmance is that *especially* if the facts adduced in the 1980 hearings are considered, the classification by sex in the MSSA is indefensible.

D. The Record Amply Supports the Factual Findings and Conclusions of the District Court That Male-Only Registration Is Not Positively Correlated to the National Defense [57]

The principal argument of Appellant, both at trial and on appeal has been that the registration of women would undermine the flexibility of the Armed Forces in time of mobilization or war. The District Court found, to the contrary, that:

> "it is the antithesis of 'flexibility' to exclude women from the pool of registrants that could be called upon in a time of national need." (Jur. St., 43a).

The District Court concluded that:

> "The record here . . . reveals that women do serve a useful role in the military and provide important skills. The foregoing discussion also illustrates that flexibility is not enhanced, but is in fact limited by the complete exclusion of women. We therefore hold that the complete exclusion of women from the pool of registrants does not serve 'important governmental ob-

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57. On direct appeal to this Court, the factual findings of "the District Court are, of course, governed by the 'clearly erroneous' standard of Fed. Rule Civ. Proc. 52(a) just as fully . . . as when a civil case is being reviewed by a court of appeals." *United States v. General Dynamics Corp.*, 415 U. S. 486, 508 (1974). *See also United States v. United States Gypsum Co.*, 333 U. S. 364, 394 (1948).

jectives' and is not 'substantially related', *Craig v. Boren, supra,* at 197, to any alleged government interest." (Jur. St., 43a).

The factual findings of the District Court which led it to this conclusion were based almost entirely upon the testimony given and documents produced by Appellant and other federal officials, primarily senior personnel of the Department of Defense[58] and of the Armed Forces. The District Court relied upon the shared views of the President and the nation's military and civilian defense officials in concluding that flexibility was not enhanced by gender discrimination in registration. The facts found by the trial court are detailed at Jur. St., 31a-43a.[59] To avoid repeating that comprehensive discussion, and because the administration's testimony before Congress was presented in Section II(E) above, Appellees present to the Court only a summary of the significant additional record support for the findings of the District Court, organized by source.

1. The Senior Military Officers and Military Studies

Since 1948, the senior officers of the Army have testified in favor of including women in the draft.[60] As the District Court noted, each of the Joint Chiefs of Staff testified in the Senate Subcommittee in 1979, even before the Administration proposed to amend the MSSA, in favor of female registration. (Jur. St., 39a, n. 30). The problem

58. Plaintiffs tried without success to join the Department of Defense and Department of the Army as Defendants. See Order of July 27, 1976, denying plaintiff's Motion to Join Further Defendants.

59. Plaintiffs' Proposed Findings of Fact were submitted to the trial court on July 2, 1980. Defendants did not request any findings of fact prior to the July 18 Memorandum Opinion, nor did they thereafter seek to challenge or amend the facts found in the District Court. Appellant is therefore limited to challenging the sufficiency of the evidence for those findings under the "clearly erroneous" standard. Fed. R. Civ. P. 52(b).

60. *See,* p. 11, above.

of "flexibility" in available combat replacements arises only if "the support base and the operating base to the rear consist in large measure of women."[61] For precisely that reason, when asked for the number of female conscripts to be utilized in a mobilization for a war in Europe with the Warsaw Pact nations, the Services replied that they could best use 80,000 women in the third through sixth months of mobilization. (Jur. St., 31a-32a). The "non-impact" of drafting women upon the Army's ability to "reach back" to combat trained and available support troops is plain from the Army's own studies.

Evaluation of Women in the Army ("EWITA") (March 1978) (R637-846) computes the theoretical maximum female content of the Army enlisted ranks at current force levels under the assumption of a "European scenario" war with the Soviet Union. (EWITA, I-17, (R666)). This is the scenario in which the need for combat soldiers would be greatest, and the need for women the least. Even under those circumstances, Table 1.7 (EWITA, I-26 (R675)) shows that of 589,200 present enlisted positions, only 261,700 would be closed to women for reasons of combat exclusion. Of the remaining 327,500 "interchangeable positions", promotional/rotational considerations close another 47,700 positions and the "flexibility for combat" relied upon by the Government closes only another 120,000. This leaves a theoretical female component acceptable to the Army of 159,700 positions (27%) in the current force structure of that one Service. This is more than twice the actual number of women in the Army.[62]

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61. Testimony of General Rogers before the Senate Subcommittee on Manpower Personnel (March 13, 1979) (R1222).

62. The all-Service goal of 250,000 women in a total peacetime volunteer force of 2,000,000 persons leaves 1,750,000 males available to be "flexed" into combat. The Armed Forces' induction projections of 80,000 women and 570,000 men in 6 months would yield, by addition to the peacetime force, 330,000 women and a 2,650,000 person total force. In addition, the nearly all male Reserve

Clearly, the number and percentage of males available for combat will not be seriously diminished by drafting women.

General Tice also testified that even in wartime, conscripts are placed in non-combat specialties, including traditionally "female" positions. Tice Deposition, 10-11 (R1634-35). He acknowledged that substantial numbers of women could be used in wartime, and that the ratio of male to female draftees ought to be a matter of military judgment. Tice Deposition, 18, 35-36 (R1642, 1659-60).

As Lieutenant General Moore testified, the Army would have to look to the circumstances at hand to decide whether women should be drafted at a given time. He further testified that existing unit Max-Wac (maximum female content) levels took into account the need for combat flexibility. Deposition of Lt. Gen. Harold W. Moore, 71, 81-82 (R1491, 1501-02).

In assessing the adequacy of the record support for the trial court's conclusion that flexibility is not served by depriving the nation of the talents of 51 percent of the draft age population, this Court should note the additional military studies reflecting the Army's history of increased utilization of women which also formed a substantial basis for the trial court's findings.

For example, Chapter 3 of *"America's Volunteers"* [63] summarizes much of the empirical literature on the utilization of women. Two points bear emphasis. First, "even in the traditional occupations [administrative and clerical positions] there is room for growth in the number of

62. (Cont'd.)

Combat Units and Individual Ready Reserve would also be added to the force. Deposition of Assistant Secretary of Defense Pirie, 19-26 (R1590-1597); Deposition of Principal Deputy Assistant Secretary of Defense Danzig, 7-8 (R1605-1606); Deposition of Major General Tice, Deputy Assistant Secretary of Defense for Military Personnel Policy 19-20, 22-23 (R1643-44, 1646-47).

63. *America's Volunteers, A Report on the All-Volunteer Armed Forces,* Dec. 31, 1978 (R287-314).

women." *America's Volunteers,* p. 72 (R297A). Second, women are now employed by the Army "throughout the battlefield". *Id.,* p. 75 (R299). The current Army view of a "woman's place" is a matter of record:

> The current Army policy states: "Women are authorized to serve in any officer or enlisted specialty, except some selected specialties, in any organizational level and in any unit of the Army except infantry, armor, cannon field artillery, combat engineer, and low altitude air defense artillery units of battalion/squadron or smaller size."
>
> This means that women may be assigned to brigade level headquarters, Hawk or Hercules Missile Air Defense Units, missile and field artillery elements such as Lance units, signal battalions and wheel and track vehicle maintenance battalions. They can fly the new Blackhawk helicopter in non-direct combat roles and now some positions in the elite units such as the 82d and 101st Airborne Divisions are open to women. Policy, however, restricts them from serving in an attack or scout role.

America's Volunteers at 75 (footnote omitted) (R299).

The empirical basis for the wider deployment of female soldiers is impressive:

> From these directives, it is clear that women soldiers are an important and integral part of the Army. They will be expected to pull their share of the workload in the combat environment as do men in the same MOS, but will not be assigned to certain of the most arduous combat units or skills.
>
> These changes in Army policy are not whims, but are based on extensive study. One such study is called "Women Content in the Army (WITA). As part of WITA, in 1976, the Army conducted major tests on the impact of female participation in company size units. Units were tested in three-day field exercises

with from 0% to 35% women. The results of those test (called MAXWAC) showed no degradation in unit performance as a result of female content.[8] A second part of WITA was conducted in 1977. During the major NATO exercise, REFORGER-77 conducted in the fall of 1977, the effect of women in units on sustained operations was tested. This test, called REFWAC,[9] reconfirmed the MAXWAC results. Women soldiers can and do perform well in combat support units in the field as well as in garrison. There is no significant difference in the performance of those kinds of units. Such trends as did exist showed that, if anything, the integrated units did better, especially when the number of women were above the token level and the men and women were well trained.

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8. *Women Content in Units Force Development Test (MAXWAC),* U. S. Army Research Institute for the Behavioral and Social Sciences, October, 1977.

9. *Women Content In The Army-Reforger 77,* U. S. Army Research Institute for the Behavioral and Social Sciences, 15 March 1978.

Id., at 76 (R300).[64]

2. Civilian Defense Officials

Most of the testimony to subcommittees of both Houses of Congress on the President's request for authority to register women was given by the responsible officials of the Department of Defense. The District Court relied heavily upon this testimony, and that reliance is cited throughout Section III(c) of the Memorandum Opinion of the District Court. (Jur. St., 22a-43a). Without recapitulating the trial court's Opinion or the Congressional testimony of those officials cited in Section II above, the testimony of the senior civilian Pentagon officials shall be summarized, because it is dispositive of the pur-

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64. Pertinent parts of the Reforger 77 study appear in the Record at R847, et seq.

ported justifications male-only registration raised by the Government on appeal:

1. In time of war, the number of women doing work essential to the readiness and capability of the Armed Forces would inevitably expand beyond the peacetime goal of 250,000.[65]

2. Flexibility is enhanced by having available a pool of women who are likely to have a higher concentration of clerical and administrative skills than would a random pool of young men. This would permit efficient and rapid replacement of support troops transferred into combat positions. (R1032, 1585-88).

3. It is in the interest of national security that, in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women. Those women should be available for service in the jobs they can do, just as men will be available for jobs they can do. (R1033).

From the objective fact of the performance of the Army's female soldiers over the past forty (40) years, from the expert opinions of every major military professional and civilian defense personnel manager of record, and from the statements and actions of the President of the United States, the District Court drew upon a record which amply supports its conclusion that "the complete exclusion of women from the pool of registrants does not

65. Statement of Robert B. Pirie and Dr. Bernard Rostker Before House Subcommittee on Military Personnel, March 5, 1980 (R1030). Assistant Secretary Pirie is only recently a civilian, having retired after twenty (20) years as a Navy officer with such varied and important duties as commanding a nuclear submarine and comparing the combat capability of Soviet and United States units. (R1078, 1578-79).

serve 'important governmental objectives' and is not 'substantially related' . . . to any alleged governmental interest." (Jurs. St., 43a). In fact, under even the most cursory scrutiny, male-only registration is constitutionally indefensible on the record in this case. The findings of the District Court manifestly cannot be considered to be clearly erroneous; its conclusion should therefore be affirmed.

V. CONCLUSION

The MSSA requires, quite literally, the registration for compulsory military service of the male lame, the male halt, and the male blind. It excludes from registration and thus from conscription under any circumstances, all females, from the traditional clerk-typist to those who can crew a 155 mm. howitzer (lifting its 95 pound shell and 19 pound loading tray, carrying that load 10 feet, and sustaining fire at Army standard rates).[66] (R1750-51). The discriminatory registration provisions of the MSSA thereby deprive the nation of the full range of skills present in the female population and needed by the Armed Forces in time of war. Appellant himself admits that the system is inequitable to men and women and that it ill-serves the stated purposes of the MSSA. Accordingly, it is constitutionally indefensible—so clearly, indeed, that this Court need not call for further briefing or argument before affirming.

The granting of this Motion to Affirm need not cause any disruption to the national preparedness. Whenever an ongoing legislative or regulatory scheme requires modification in order to comport with constitutional standards, this Court may issue its mandate, staying its judgment for an appropriate time in which Congress can decide how best to remedy the constitutional or other infirmities of its prior legislation. *See, e.g., Buckley v. Valeo,* 424 U. S.

66. *U. S. Army Human Engineering Laboratory,* Ammunition Loading and Firing Test—Pretest Physical Conditioning of Female Soldier Participants (R1744-1747).

1, 143-44 (1976). If registration is deemed by Congress to be essential to our military or foreign policy, Congress can be expected speedily to enact appropriate legislation, recognizing that it "may not employ an invidious discrimination to sustain the political viability of its programs." *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 266 (1974). With that in mind, Appellees respectfully urge that the Order of July 18, 1980 be affirmed summarily, and suggest that the judgment of affirmance be stayed for thirty days.

Respectfully submitted,

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